

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

THOMAS H. KRAKAUER,
on behalf of a class of persons,

Plaintiff,

v.

Civil Action No. 1:14-cv-00333-CCE-JEP

DISH NETWORK, L.L.C.,

Defendant.

STIPULATION REGARDING THE CLASS DEFINITION

The parties, Plaintiff Thomas H. Krakauer and Defendant DISH Network L.L.C. (“DISH”), hereby stipulate and agree as follows:

1. On September 9, 2015, the Court granted Plaintiff’s Motion for Class Certification, and certified the following classes: (a) all persons whose telephone numbers were on the NDNC list for at least 30 days, but who received telemarketing calls from SSN to promote DISH between May 1, 2010, and August 1, 2011 (the “NDNC class”); and (b) all persons whose telephone numbers were on the IDNC list of DISH or SSN, but who received telemarketing calls from SSN to promote DISH between May 1, 2010, and August 1, 2011 (the “IDNC class”). (ECF No. 111 at 4, 34.)

2. On April 15, 2016, DISH served Plaintiff with proposed trial Exhibits 31A through S setting forth various defense challenges to Plaintiff’s Telephone Consumer Protection Act (“TCPA”) claims by telephone number and phone call.

3. Plaintiff has analyzed Exhibits 31A-S and the defense challenges embodied in those exhibits. In an effort to narrow issues for trial and facilitate the effective

presentation of classwide proof, Plaintiff agrees that certain telephone numbers, and calls to those numbers, should be carved out of the class. Because the class has received notice of class certification under Federal Rule of Civil Procedure 23(c)(2)(B), class members with those telephone numbers will receive notice of this action.

4. Below are the defense challenges the Plaintiff does not contest:

Exhibit No.	Name of Exhibit	Numbers/ Calls
31B	Different Listing Names Associated with the Same Number (in MicroBilt data)	47 numbers/ 140 calls
31E	Phone Numbers Where Line Type Designation Is Business or Government at Least Once in LexisNexis Data	115 numbers/ 302 calls
31F	Records from MicroBilt Data Where the Listing Name Appears to Be a Business, Based on Key Words as Listed.	52 numbers/ 174 calls
31G	a – Numbers Where Line Type Designation is Always “Unknown for all Records Associated with the Number in the LexisNexis Data, and Listing Name in MicroBilt Data Appears to Be a Business by Key Words Listed	5 numbers/ 15 calls
	b – Numbers Where Line Type Designation is “Residential” at Least Once in LexisNexis Data and Listing Name in MicroBilt Data Appears to Be a Business by Key Words Listed	7 numbers/ 27 calls
31I	Numbers Where the Listing Type Designation in LexisNexis Is Residential During Only the Period Before May 2010 and/or After August 2011; is “Unknown” for the Period Between May 2010 and August 2011; and Different Individuals Are Associated with the Same Number Across Those Two Time Periods	125 numbers/ 344 calls
31N	a – Records from Five9Data of Numbers for Which a Retailer IDNC Request Was Made, but for Which the Number is Associated with a DISH Customer with Activation Date Subsequent to the IDNC Request, and the Number Was First Called After the DISH	603 numbers/ 1605 calls

	<p>Activation Date</p> <p>b – Records from Five9 Data of Numbers for Which an Internal IDNC Request was Made, but for Which the Number is Associated with a DISH Customer with Activation Date Subsequent to the IDNC Request, and the Number was First Called After the DISH Activation Date</p>	<p>113 numbers/ 299 calls</p>
31P	<p>a – Calls to Numbers that Do Not Appear on any DNC or IDNC List, but for which the “Phone 1” Field Associated with that Number Was Populated with a Number that Appears on a DNC or IDNC List and was Subsequently Called</p> <p>b – Calls to Numbers that Do Not Appear on any DNC or IDNC List, but for which the “Phone 2” Field Associated with Number was Populated with a Number that Appears on a DNC or IDNC List and was Subsequently Called</p>	<p>9 numbers/ 33 calls</p> <p>11 numbers/ 56 calls</p>
31Q	<p>Five9 Call Records in which the First Call to the Number Contains Comments that Suggest that the Recipient Requested a Call Back or Appears to Agree to be Called Back</p>	<p>18 numbers/ 95 calls</p>
31R	<p>a – Five9 Call Records of Numbers for Which Some Calls Were Made Before the Number Was Added to the IDNC Retailer List and for Which Some Calls Were Made at Most 30 Days After the Retailer IDNC Request</p> <p>b – Five9 Call Records of Numbers for Which Some Calls Were Made Before the Number Was Added to the IDNC Internal List and for Which Some Calls Were Made at Most 30 Days After the Internal IDNC Request</p>	<p>71 numbers/ 280 calls</p> <p>23 numbers/ 66 calls</p>

31S	a – Five9 Call Records of Numbers for Which All or Some of the Calls Were Made Before or More than 5 Years After the Retailer IDNC Request for that Number	104 numbers/ 367 calls
	b – Five9 Call Records of Numbers for Which All or Some of the Calls Were Made Before or More than 5 Years After the Internal IDNC Request for that Number	434 numbers/ 1196 calls
TOTAL	[Accounting for overlap and duplicates]	1,494 numbers/ 4,231 calls

5. The Court has the authority to modify a class definition at any time before final judgment. Fed. R. Civ. P. 23(c)(1)(c) (“An order that grants or denied class certification may be altered or amended before final judgment.”); *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 160 (1982) (“Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation.”); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n. 11 (1978) (describing class certification order as “inherently tentative”).

6. The parties request that the Court enter an order modifying the class definition to exclude those persons whose telephone numbers appear on the attached Stipulated Exclusion List. Plaintiff will, within thirty days after an order modifying the class definition is entered, send postcard notice in accordance with the class notice order (Doc. 153) to those persons previously provided with class notice with respect to those telephone numbers explaining that they are excluded from the class. The parties agree that this stipulation does not waive any right to challenge any ruling in this action, including but not limited to the class certification order and the class notice order. DISH reserves its right

to seek to admit evidence relating to this stipulation at trial; Plaintiff reserves his right to oppose the admission of that evidence.

Dated: November 4, 2016

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